controversy, the junior claimant can gain no possession of that subject against the better right of the senior claimant. If the law were otherwise, as was said by Judge Baldwin, the lawful owner might be disseized, not only without his knowledge, but without the means of acquiring it. *Taylor v. Burnside*, 1 Gratt. 169, 200 (side page 196).

Without discussing in detail the action of the court in giving and refusing the other instructions given and refused, it is sufficient to say that under the facts of this case, the rulings of the court upon these instructions were correct.

The judgment of the Circuit Court must be reversed, and the cause remanded for a new trial to be had in accordance with this opinion.

Reversed.

BY THE EDITOR.—The clear and cogent opinion of the court in this case leaves nothing to be added, except to invite the profession to a careful examination of the numerous questions decided, so important in the practice. "Color of Title" is discussed in an article by F. W. Sims, Esq., of the Louisa (Va.) bar, ante, p. 553, *et seq.*, to which we call attention in connection with the principal case.

LONG V. PENCE'S COMMITTEE.*

Supreme Court of Appeals: At Staunton.

September 24, 1896.

1. MOTIONS TO RECOVER MONEY—*Assignee against remote assignor.* Under the provisions of sec. 2861 of the Code an action may be maintained by an assignee of a chose in action against a remote assignor thereof to recover money upon the contract implied by the assignment that he will repay the consideration received by him for the chose, if by the use of due diligence it cannot be made out of the obligor or maker. Hence, under the very terms of sec. 3211 of the Code, an assignee may proceed by motion against a remote assignor for a like recovery.

2. ASSIGNOR AND ASSIGNEE—*Suit on assignment—Evidence of assignment—Judgment.* In a proceeding by an assignee of a note against a remote assignor to recover on the contract implied by the assignment, the note is a necessary piece of evidence for the plaintiff in order to prove the assignment, and also to show the measure of the plaintiff's recovery; for, in the absence of proof to the contrary, the law presumes that the assignor received for the note a sum equal to that specified in it. The fact that the note was seen and inspected by the court need not be expressed in the entry of the judgment, but the expression of it does not vitiate the judgment, nor show that the judgment was rendered on the note and not on the contract implied from the assignment.

*Reported by M. P. Burks, State Reporter.

3. HOMESTEAD EXEMPTION—*Waiver — Assignment — Judgment — Harmless error.* The waiver of the homestead exemption in the body of a non-negotiable note is only a waiver as to the particular obligation expressed in the body of the note, and not as to the implied obligation growing out of an assignment of the note, and as against the liability of the assignor to the assignee the former may claim the benefit of the exemption, although the note declares that "the drawer and endorsers each hereby waive the benefit of our homestead exemptions." And in an action on the assignment by the assignee against the assignor, the statement in the entry of the judgment that the homestead is waived does not vitiate the judgment. The judgment in this respect will be amended and affirmed.

Error to a judgment of the Circuit Court of Rockingham county, rendered October 16, 1895, on a motion wherein the defendant in error was the plaintiff and the plaintiff in error was the defendant.

Amended and affirmed.

This was a proceeding by motion by an assignee against a remote assignor of a note which was conceded to be not negotiable because it did not appear on its face to be payable at a bank in this State. The following is a copy of the note:

"$1234.00. HARRISONBURG, VA., March 8th, 1892.

Two years after date we promise to pay to Daniel S. Long or order, one thousand two hundred and thirty-four dollars, with interest from date, the interest to be paid annually at the end of each year for value received, negotiable and payable at the First National Bank of Harrisonburg, without offset: and we, the drawers and endorsers, each hereby waive the benefit of our homestead exemption and all other exemptions as to this debt.

J. W. CARPENTER,
MARY E. CARPENTER.

Endorsement on back of note:

Pay to the order of J. W. Click, March 21, 1892.

D. S. LONG,
J. W. CLICK."

No evidence is certified in the record, and no bill of exceptions was taken. There does not appear to have been any appearance for the defendant till the succeeding term of the court, after the judgment was rendered, when a motion was made in the Circuit Court to reverse the judgment rendered at the previous term. The entry of the judgment complained of was in the following words:

"This day came the plaintiff by his attorney, and the defendant upon whom it appears that notice of this motion has been duly executed being solemnly called came not. Whereupon the notice and writing sued on being seen and inspected by the court, it is therefore considered by the court that the plaintiff recover against the defendant twelve hundred and thirty-four dollars, with interest thereon

from the 8th day of March, 1892, until paid, and costs on an instrument waived the homestead."

Sipe & Harris, for the plaintiff in error.

Wm. L. Yancey, for the defendant in error.

RIELY, J., delivered the opinion of the court.

This case is before us upon a writ of error to a judgment rendered on a motion by the assignee of a promissory note against a remote assignor.

It was contended that the law does not authorize the proceeding by motion in a case of this kind.

Sec. 3211 of the Code provides that "any person entitled to recover money by action on any contract may, on motion before any court which would have jurisdiction in an action otherwise than under section thirty-two hundred and fifteen, obtain judgment for such money . . ." The statute thus authorizes the proceeding by motion whenever a person is entitled to recover money in action on "any contract." The only restriction imposed by the statute as to the nature of the contract upon which the recovery may be by motion is the right to recover *money* upon it by action. If the contract is such that the person making the motion is entitled to recover *money* upon it by *action*, he is entitled to proceed to do so by motion, whether his right is based upon an expressed or implied contract. The remedy exten s to all cases in which a person is entitled to recover money by action on contract. Report of Revisors of Code of 1849, Vol. 2, p. 832, note; and *Hale v. Chamberlain*, 13 Gratt. 658; and 4 Minor's Insts. (3d ed.) p. 633.

Prior to the statute authorizing a recovery from an assignor, an assignee had the right upon the principles of the common law to recover from his immediate assignor under the contract implied from the assignment, that the assignor would repay the consideration he had received for the chose in action assigned, if payment thereof by the use of due diligence could not be obtained from the obligor or maker. This implied promise was not considered, however, to extend at law to any other than the immediate assignee, and consequently no assignee could recover at law from a remote assignor. *Mackie's Exor. v. Davis*, 2 Wash. 219; *Caton & Veale v. Lenox*, 5 Rand. 31, 42; *Mandeville & Jameson v. Riddle & Co.*, 1 Cranch, 290; and *Yeaton v. Bank of Alexandria*, 5 Cranch, 49. But, although not assignable at law, the implied contract was deemed transferable in equity, and a court of equity would

enforce it. *Riddle & Co. v. Mandeville & Jameson*, 5 Cranch, 322; and *Bank of U. S. v. Weisiger*, 2 Peters, 331.

The statute (sec. 2861 of the Code) provides that any assignee may recover from any assignor of such writing as is described in sec. 2860, but that a remote assignor shall have the benefit of the same defence as if the suit had been instituted by his immediate assignee. The effect of the statute (sec. 2861) is to extend to a remote assignee the benefit of the promise implied by law from an assignor to his immediate assignee, and to give to the remote assignee, as well as to the immediate assignee, the right to recover upon such implied promise. The right which he previously had in equity the statute gives to him at law. 2 Robinson (new) Pr. 283; *Drane v. Scholfield*, 6 Leigh, 395. The right of recovery is founded in every case upon the implied contract created by the assignment, and the remedy for the enforcement of the right is the action of *assumpsit*. 3 Robinson's New Prac. 396; 3 Minor's Insts. (2 ed.) 436; *Arnold v. Hickman*, 6 Munf. 15; and *Drane v. Scholfield*, 6 Leigh, 386.

The proceeding by motion in the case at bar is on a contract upon which the plaintiff would be entitled to recover money by action, and therefore comes within the very terms of the statute authorizing a recovery by motion.

It was also assigned as error that even if the court had the right to give judgment on the motion, it did not have the right to give such a judgment as was entered.

The alleged ground of this objection is that the judgment does not conform to the cause of action set out in the notice, and that the entry of the judgment shows that the court considered the note as the ground of the motion and not the implied liability created by the assignment. This objection is more apparent than real. The note was a necessary piece of evidence in support of the motion in order to prove the assignment. It was also necessary to enable the court to fix the measure of the recovery; for, in the absence of proof to the contrary, the law presumes that the assignor received for the note a sum equal to that specified in it. 2 Rob. New Prac. 274, 457; and 3 Minor's Institutes, 372 and 437. The motion being heard by the court, it was necessary for it to inspect the note for these purposes, and the statement of the fact of such inspection in the entry of the judgment, which was wholly unnecessary, is doubtless what gave rise to this objection. But if the court had entered the judgment in the formal manner contended for, it would have been for the very same amount for which it was entered.

It is right in substance, if not technically right in form. The informality is a harmless error, and can work no possible injury to the plaintiff in error. The informal entry of a judgment is not a ground for reversing it. Code of Va., sec. 3449.

A further objection was made to the judgment in that it declared, in obedience to the requirement of the statute (Acts 1889–90, p. 117), that the homestead exemption was waived.

Waiver of the exemption, prescribed by the Constitution and by Chap. 178 of the Code, is provided for in sec. 3647. It reads, so far as it is necessary to notice it, as follows: "If any person shall declare in a bond, bill, note, or other instrument, by which he is or may become liable for the payment of money to another, or by a writing thereon or annexed thereto, that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of this chapter, the said property or estate, whether previously set apart or not, shall be liable to be subjected for said obligation, under legal process, in like manner and to the same extent as other property or estate of such person. . . . ."

It thus appears that the waiver is required to be in writing, and must be expressed in the bond, bill, note, or other writing itself, which is the evidence of the obligation, or by a writing thereon or annexed thereto; and where it is so done, the exemption is declared to be waived as to the *said obligation.*

There was such waiver in the body of the note referred to, and it was expressed to be a waiver as to the endorsers as well as to the drawers (makers) of the note. Strictly speaking, the assignors were not endorsers, but the waiver would perhaps be construed to include them, according to the intention of the parties. Yet, if so, the waiver was only as to the particular obligation expressed in the body of the note; and not as to the implied obligation growing out of the assignment, which is the ground of the motion in this case. The latter is a wholly different obligation. The motion was not based upon the note. Neither the note, nor the obligation of which it is the evidence, was the ground of the motion, but it was, as we have seen, the implied obligation created by the assignment. As to this implied obligation, there was no waiver of the exemption, and the court erred in so adjudging. Such error is, however, not a ground for reversing the judgment, but it may be amended in this respect. And being so amended, it must be affirmed. *Amended and affirmed.*

BY THE EDITOR.—The motion in this case (which, as shown by the court, was clearly within the scope and meaning of sec. 3211 of the Code) was not on the note, but on the assignment. The Reporter, in his statement, gives a copy of the note, which see.

It was conceded by counsel and considered by the court, that the note was not negotiable according to our statute, sec. 2849 of the Code, because "on its face" not payable in this State at a particular bank, &c. This construction of the statute was anticipated by the REGISTER. See 1 Va. Law Reg., note prepared by Associate Editor (Prof. W. M. Lile), at pp. 155–157.

As to the right or privilege of waiver of exemption. As we understand the decision, if the note had been negotiable, the waiver in the body of it by the endorsers as well as the makers would have been effectual as to both; for every endorser in such case accepts and adopts by his endorsement the waiver contained in the body of the note. By the endorsement he undertakes to pay the note, if the maker does not at its maturity, provided there be due presentment and demand of payment at the proper time and place, and, on default by the maker, due notice of such default be given to the endorser. The conditions complied with, the endorser becomes as much bound to pay the note as the maker is, and the waiver as to the note extends to the endorser as well as the maker. Hence, the incorporation in negotiable notes of a waiver of exemption by the endorsers, as is the custom, is effectual as to them.

Not so, however, as to assignments of non-negotiable notes. The assignor is not bound by the note or by his assignment of it, in the absence of a special agreement to that effect, to pay it, as in the case of an endorser of a negotiable note. His undertaking is to refund or repay the value of the consideration he has received for the assignment, if the assignee, by the exercise of due diligence, cannot recover the debt assigned. The implied contract between the assignor and assignee of a non-negotiable note is different and quite distinct from the contract between the maker and payee of such note; and hence the waiver of exemption as to the obligation of *the note* does not embrace the obligation arising out of *the assignment.* This was decided by the court. The same rule would apply to the assignment of a bond or any other non-negotiable instrument.

The distinction pointed out is of much importance in business transactions. If an assignee, as distinguished from an endorser, desires to secure from his assignor a waiver of exemption, he must provide for it in the assignment or by some "writing thereon or annexed thereto," as the statute requires.

The contract relations between assignor and assignee of a chose in action are discussed by W. B. Kegley, Esq., of the Wytheville (Va.) bar, ante, p. 559 *et seq.*